

DOCKET FILE COPY ORIGINAL

BEFORE THE

ORIGINAL

Federal Communications Commission

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SUMMARY

In these Reply Comments, Channel 63, Inc. ("Channel 63"), the licensee of Home Shopping Network-affiliated WIIB(TV), Bloomington, Indiana, addresses the opening comments of several parties who dispute the fact that home shopping broadcast stations serve the public interest and are entitled to must carry rights.

The Center for the Study of Commercialism (the "Center") urges the Commission to effectively abolish broadcast home shopping formats. The Center does not argue that home shopping broadcast stations are failing to meet their obligation to serve the public through community-responsive programming; nor can it, since stations such as WIIB(TV) air an amount of public affairs programming that substantially exceeds the amount presented by most non-home shopping stations. Instead, the Center contends that home shopping formats are by their nature contrary to the public interest. There is no merit to this suggestion. Home shopping formats add diversity by increasing viewer choices, and such formats have allowed many fledgling UHF stations to remain viable. In any event, the Commission years ago abandoned regulation of broadcasters based on their programming formats, holding instead that the viewing public should be the arbiter of programming. There is no evidence that home shopping stations are not subject to the same marketplace forces today, and Congress has not directed the Commission to change its well-established policy.

Nor can the abolition of home shopping formats be justified on a constitutional basis. Such a course of action would not directly affect the amount of public affairs programming available to viewers, and would constitute a serious infringement on broadcasters' programming freedoms.

The Center also suggests that home shopping broadcast stations be denied a renewal expectancy even if they are made to air different programming. However, not only is such a policy contrary to the 1992 Cable Act, but it would impose an unwarranted policy on broadcasters that have chosen, under established Commission policy, to air such programming.

Three other commentators in this proceeding do not share the Center's views, but nonetheless urge that home shopping broadcast stations be denied must carry rights. Their arguments are similarly flawed. As long as the Commission can conclude that home shopping broadcast stations are meeting their obligation to air sufficient community-responsive programming, then there is no reason not to consider these stations as "local broadcast stations." Home shopping broadcast stations, and particularly WIIB(TV), easily meet this standard, and should therefore be granted must carry rights. At an absolute minimum, the Commission should adopt a standard and a mechanism by which individual home shopping stations may show that they are meeting the needs and concerns of their local communities sufficiently to merit must carry status.

Commission's new "must carry" rules. Channel 63 is the licensee

Bloomington's "shopping and public affairs station." WIIB(TV)'s efforts illustrate the extraordinary dedication of home shopping broadcast stations to airing non-entertainment programming responsive to the needs and concerns of their communities, and clearly prove that home shopping stations are serving the "public interest, convenience, and necessity."

4. A number of commentators, however, dispute that home shopping broadcast stations serve the public interest and are entitled to must carry rights. The greatest indictment of home shopping stations is undertaken by the Center, which argues in its comments not only that home shopping broadcast formats should be abolished as antithetical to the public interest, but that home shopping stations should be denied a renewal expectancy even if they are made to air alternate programming. Continental, Time Warner and NCTA take a slightly different tack. While rejecting (or at least not supporting) the notion that home shopping broadcast formats are contrary to the public interest, these commentators maintain that home shopping stations should be denied must carry rights. Below, Channel 63 shows the lack of merit in each of these contentions.

Discussion

A. Home Shopping Stations Serve the Public Interest

1. Home Shopping Stations Provide a Substantial Amount of Issue-Responsive Non-Entertainment Programming

5. According to the Center, the "critical inquiry" in this proceeding is "[w]hether a broadcaster which, typically broadcasts, each hour, 5 minutes of arguably community responsive

programming and 55 minutes of non-stop commercial sales presentations" serves the public interest. Center Comments at iii. What the Center does not state is that five minutes per hour of community-responsive programming, 24 hours a day, equates to two hours of such programming on every broadcast day, or at least 60 hours per month.^{1/} This is far more than the average non-home shopping station devotes to such programming.

6. Nor is it even "arguable" that such public affairs programming is community-responsive. NCTA asserts that "home shopping stations do not generally provide any of the news, public affairs, or other types of programming 'critical' to an informed electorate that Congress purported to advance by conferring must carry rights on local broadcast stations." NCTA Comments at 5. While it may be true that home shopping broadcast stations generally lack the considerable resources required to present local newscasts, it is not true that these stations fail to contribute to an "informed electorate." The numerous public affairs programs, community event announcements, and most particularly, the abundance of community leaders and officials that WIIB(TV) features on a daily basis are testimony to the fallacy of NCTA's claim.

^{1/} Even this is not the limit on the time many home shopping stations devote to issue-responsive programming. As shown in Channel 63's opening comments, WIIB(TV) additionally reserves a three-hour block of time each week for the airing of full-length public affairs shows, full-length children's programming, and religious programming.

2. There Is No Basis for a Finding That Home Shopping Broadcast Formats Are Contrary to the Public Interest, and Congress Has Not Mandated Such a Finding

7. At bottom, the Center does not argue that home shopping broadcast stations are failing to air non-entertainment programming addressing the needs and interests of their communities. Instead, the Center alleges that "[w]hat is critical to the public interest determination is the fact that the remaining 55 minutes of each hour contains nothing more than purely commercial matter." Center Comments at 18. Thus, the Center's position rests not on the notion that home shopping broadcast stations are failing to meet their obligation to serve the public through community-responsive programming, but on the argument that the program format of home shopping stations violates some undefined notion of "overcommercialization" and is therefore antithetical to the public interest.^{2/}

8. As the Center is forced to concede, however, the Commission long ago abandoned both the concept of "overcommercialization" and the business of regulating

^{2/} None of the commentators addressed herein seriously challenges the fact that under the three factors set forth in the 1992

broadcasters' program formats. The Center acknowledges that in 1984, the Commission decided to leave it to the marketplace to determine whether a broadcaster has "overcommercialized," properly stating that "if stations exceed the tolerance level of viewers by adding 'too many' commercials the market will regulate itself, i.e., the viewers will not watch and the advertisers will not buy time." Commercial TV Stations, 98 F.C.C.2d 1076, 1105 (1984). Three years later, on the same basis, the Commission upheld the permissibility of home shopping formats, stating that

marketplace forces are applicable here. The format will not be sustained if the sales generated do not support the operation of the television station. At the same time, such stations, by their news and public affairs programs, provide another outlet for responding to the issues confronting the community.

Family Media, Inc., 2 FCC Rcd 2540, 2542 (1987).

9. The Center nonetheless claims that by employing home shopping formats, home shopping stations "have evaded the marketplace forces upon which the Commission has attempted to rely." Center Comments at 9. The Center provides absolutely no explanation of why this is so. From a marketplace perspective, home shopping broadcast stations are indistinguishable from any other broadcast station. All local broadcast stations compete for viewership with each other, with cable, and with other video providers. There is no basis whatsoever for asserting that home shopping stations are somehow exempt from the marketplace forces that affect all broadcasters. And there is no reason for the Commission to alter its determination that the viewing public should determine what programming formats are in its own interest.

10. Contrary to the Center's claims, Congress has not mandated that the Commission change its long-standing policy. Congress has merely directed that the Commission consider the matter anew and make a de novo determination with respect to home shopping stations. As shown in Channel 63's opening comments, under the three factors enunciated in the 1992 Cable Act -- and, more importantly, under the Commission's traditional determinant of a licensee's community responsiveness -- there is ample evidence on which the Commission can find that home shopping broadcast stations continue to serve the public interest.

3. **Abolishing Home Shopping Stations Would Constitute an Unwarranted Encroachment on Broadcasters' Programming Discretion and First Amendment Rights**

11. The most dangerous aspect of the Center's arguments is that, if accepted, they would effectively destroy the programming discretion of broadcasters and re-embroil the Commission in regulating programming. As noted above, the Center's quarrel is not with the extent of community responsiveness by home shopping broadcast stations, but with the programming that these stations have chosen to air. But such a criticism can similarly be leveled against any television format. Unless the Commission is prepared to mandate the formats and programs to be aired by broadcasters, it must reject the Center's pleas for content regulation of home shopping stations. As long as a station is meeting its community-responsive non-entertainment programming obligations, there is no reason to subject any station -- home shopping or otherwise -- to regulation on the basis of the programming format it airs.

12. The type of content regulation the Center envisions seriously implicates the First Amendment rights of broadcasters, and the Center's attempt to justify such regulation under the First Amendment is unpersuasive. In the first place, Channel 63 submits that the scope of First Amendment protection for commercial speech is far broader than that which the Center advocates. See Center Comments at 12-13. But even accepting the Center's troubled view for the sake of argument, it is clear that

effect on the amount of public affairs programming the station airs, but would remove one type of programming format from the market -- thereby defeating, not fostering diversity. For these reasons, the Center's constitutional justification for its position is meritless.

**B. There Is No Merit to the Center's Suggestion
That Home Shopping Stations Should Receive No
Renewal Expectancy**

14. As set forth above, no colorable basis exists for a finding that home shopping broadcast stations somehow are not serving the public interest, convenience and necessity. The Center, however, takes its contrary position one step further, arguing that even should the Commission find otherwise -- and allow home shopping stations a period of time to begin offering alternative programming -- these stations should be denied a renewal expectancy when renewal time comes up. As the Center is well aware, Section 4(g)(2) of the 1992 Cable Act forbids the Commission from denying a renewal expectancy to home shopping stations "solely because their programming consisted predominantly of sales presentations or program length commercials."

15. To accomplish a result banned by the statute, the Center asserts that "[h]ome shopping formats are incompatible with 'substantial service' [warranting a renewal expectancy] as the Commission has defined it" -- again because allegedly "excessive commercialization, standing alone, . . . is contrary to the public interest." Center Comments at 22-23. Again, however, there is no evidence in the record of this proceeding on

which to make such a finding, which would mark a retreat from at least a decade of Commission policy. Home shopping broadcast stations have demonstrated strong commitment to community service, and their formats have provided additional program diversity to viewers as well as a much-needed means of keeping fledgling, predominantly UHF stations alive and competitive.

16. Moreover, denying home shopping stations a renewal expectancy after requiring them to change programming would levy an additional and unwarranted penalty on these stations. Home shopping stations have instituted their programming formats based on years of established Commission policy holding such formats permissible. Requiring these stations to reprogram from scratch, then deny them a renewal expectancy, would be patently unfair and likely devastating to many such stations.

C. Since Home Shopping Stations Serve the Public Interest, They Must Receive the Must Carry Rights of "Local Broadcast Stations"

17. Continental, Time Warner and NCTA advocate a position that varies slightly from the stance taken by the Center. None of these parties disputes that the abolition of home shopping formats would be inconsistent with existing license renewal standards and would constitute an impermissible impingement on broadcaster programming discretion. Indeed, Time Warner aptly points out that

the "all or nothing" approach proposed in the Commission's Notice mischaracterizes broadcast renewal standards as well as the underlying concerns addressed by Section 614(g). In determining a station's license eligibility, the Commission properly does not dwell on matters relating to the content of

the entertainment programming selected by the licensee, or on whether the licensee has chosen a format consisting predominantly of program length commercials. Rather, the question is whether the licensee has presented a sufficient amount of programming responsive to public issues of importance to the community, as identified by the licensee. For example, two licensees might both carry identical amounts of home shopping programming. One might qualify for a renewal expectancy because its overall programming was sufficiently responsive to local community issues, while the other station might not be entitled to a renewal expectancy because it carried no such programming.

Time Warner Comments at 6-7 (footnotes omitted); see also NCTA Comments at 2 (at least apparently conceding that home shopping stations "me[e]t the minimum requirements for retaining their broadcast licenses").

18. Yet each of these parties nonetheless argues that home shopping stations should not receive must carry rights. This contention cannot be sustained. As long as the Commission can conclude that home shopping broadcast stations are meeting the established standard of airing sufficient community-responsive programming, then these stations are contributing to localism and diversity, and there is no reason not to consider these stations "local broadcast stations" entitled to must carry rights. As Channel 63 has shown, home shopping stations such as WIIB(TV) easily meet this standard.

Conclusion

The record of this proceeding amply demonstrates that home shopping broadcast stations in general, and WIIB(TV) in particular, are dedicated to serving the needs and interests of

their communities through an abundance of issue-responsive non-entertainment programming. To "turn back the clock" as the Center suggests, and ban all of these stations simply on the basis of the program formats they air, would be contrary to established Commission policy and repugnant to broadcasters' programming freedom. Home shopping stations have served the public interest well, and they should be granted must carry rights as local broadcast stations. At an absolute minimum, the Commission should adopt a standard and a mechanism by which individual home shopping broadcast stations may show that they are meeting the needs and concerns of their local communities sufficiently to merit must carry status.

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CERTIFICATE OF SERVICE

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